JOHN S. WOLD
EUGENE V. SIMONS

IBLA 85-449 Decided December 22, 1986

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, rejecting sodium preference right lease applications W-9026 and W-9027.

Vacated and referred for hearing.

1. Administrative Procedure: Hearings--Sodium Leases and Permits: Leases--Sodium Leases and Permits: Permits

   A sodium prospecting permittee who applies for a sodium preference right lease, alleging with supportive data that he has discovered a valuable deposit of sodium and that the land is chiefly valuable for sodium, as required by sec. 24 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 262 (1982), is entitled to a hearing before an Administrative Law Judge before his lease application may be finally rejected.

2. Mineral Leasing Act: Environment--Mineral Leasing Act: Lands Subject to

   Issuance of mineral leases within the Flaming Gorge National Recreation Area require the consent of the Secretary of the Interior based on a finding that such disposition "would not have significant adverse effects on the purposes of the Colorado River storage project." 16 U.S.C. § 460v-4 (1982). Where an issue of fact is raised by the record concerning the potential impact of subsidence on the Colorado River basin, this issue may be referred for a hearing pursuant to 43 CFR 4.415.

APPEARANCES: John S. Wold and Eugene V. Simons, pro sese; Lyle K. Rising, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

John S. Wold and Eugene V. Simons appeal from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated February 14, 1985, rejecting sodium preference right lease applications W-9026 and W-9027, because the

appellants failed to meet the requirements of section 24 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 262 (1982). Section 24 of the Act provides that the Secretary may issue leases to prospecting permittees where a permittee has discovered a valuable mineral deposit of sodium and the land is chiefly valuable for the sodium deposit.

As background, we note that in October 1967 John Wold filed applications for prospecting permits, designated W-9026 and W-9027. The permits were issued effective December 1, 1968, and Wold subsequently assigned his interest in the permits to BTU, Inc. During the term of the permit, BTU, Inc., applied for a preference right lease to each parcel, alleging a discovery of valuable deposits of sodium (trona) subject to lease under the terms of 30 U.S.C. § 262 (1982). The applications were subsequently assigned to appellants.

This is the second time this case has appeared before the Board. A previous BLM decision dated July 9, 1979, also rejected appellant's sodium preference right lease applications. On appeal, this Board set aside the prior BLM decision and referred the matter for hearing before an Administrative Law Judge. John S. Wold, 48 IBLA 106 (1980). This decision was predicated on a finding that the record presented issues of material fact as to whether appellants had shown discovery of a valuable deposit of sodium on the prospecting permits and that the land was chiefly valuable for its sodium deposits, which issues required an evidentiary hearing before an Administrative Law Judge.

Unfortunately, the hearing previously ordered was not held. By stipulation dated October 5, 1981, submitted by the attorneys for BLM and appellants, the parties stipulated that appellants had filed with the Government sufficient information to satisfy the requirements for an initial showing under 43 CFR 3521.1-1(b) (1981) with respect to appellants' sodium preference right lease applications. 1/ By Order dated October 13, 1981, the Administrative Law Judge to whom the matter had been referred, dismissed and remanded the matter to the Wyoming State Office, BLM, for action consistent with the stipulation.

Upon remand BLM and the Forest Service prepared an environmental assessment and "Decision Record" covering the lands in question. On March 22, 1983, BLM forwarded these documents to appellants along with a request for appellants' final showing. On December 20, 1983, appellants submitted to BLM a

1/ The regulation in effect at the time, 43 CFR 3521.1-1 (1981), divided the required showing by a prospecting permittee applying for a preference right lease into two components, an initial showing (43 CFR 3521.1-1(b)) including data regarding the quantity and quality of minerals discovered on the permit and a final showing (43 CFR 3521.1-1(c)) submitted after an environmental analysis has been prepared including detailed data on estimated revenues and costs of mining, removing, and marketing the mineral. This regulation has since been revised. See 43 CFR 3521.1-1, 49 FR 17903 (Apr. 25, 1984). However, neither the requirement to show discovery of a valuable mineral deposit nor to show that the land is chiefly valuable for sodium has changed.

final showing in support of the preference right lease applications. The record contains a Geologic and Engineering Report for Preference Right Lease Applications W-9026 and W-9027 dated September 27, 1984, which analyzes the showings made in support of the applications and formed the basis for the conclusion of the BLM District Manager, Rock Springs, Wyoming, that the criteria for a valuable deposit and for chiefly valuable had not been satisfied. This formed the essential basis for the BLM decision of February 14, 1985, rejecting appellants' applications on these grounds.

In the statement of reasons for appeal, appellants allege that Departmental officials have previously recommended the preference right lease applications be granted citing a January 1971 internal memorandum from the Director, Geological Survey, to the Manager of the Cheyenne, Wyoming, Land Office of BLM, asserting that valuable deposits of sodium were discovered in test wells on the prospecting permits. Appellants also allege the lands in the prospecting permits have now been included by the Department in a known sodium lease area on the basis of appellants' discovery. Appellants request the Board to direct issuance of the preference right leases so they may be exchanged for leases of equivalent value for sodium involving less sensitive lands outside the Flaming Gorge National Recreation Area (FGNRA). 2/

In answer to appellants' statement of reasons, BLM argues first that the land is not chiefly valuable for sodium in view of the designation by Congress of the FGNRA setting other priorities for the land including "conservation of scenic, scientific, historic, and other values contributing to public enjoyment of such lands and waters." 16 U.S.C. § 460v (1982). BLM argues the comparative "value" of the lands for different purposes is a matter of policy rather than an issue of fact (Answer at 4). Further, BLM contends appellants have failed to show a valuable deposit of sodium and that they have waived the right to a hearing as ordered by this Board previously.

All except 320 acres of the land described in the prospecting permits and the preference right lease applications is included in the FGNRA created by Congress:

> In order to provide, in furtherance of the purposes of the Colorado River storage project, for the public outdoor recreation use and enjoyment of the Flaming Gorge Reservoir 3/ and surrounding lands in the States of Utah and Wyoming and the conservation of scenic, scientific, historic, and other values contributing to public enjoyment of such lands and waters, * * *.

2/ This proposal has been raised several times since the preference right lease applications were filed. See John Wold, supra at 112. Apparently, the key hangup has been the issue of whether appellants have shown themselves entitled to preference right leases. See 43 CFR 3526.2(b).

3/ Construction and operation of the Flaming Gorge Dam and Reservoir were previously authorized by section 1 of the Colorado River Storage Project Act of 1956, as amended, 43 U.S.C. § 620 (1982).

Act of October 1, 1968, § 1, P.L. 90-540, 82 Stat. 904 (codified at 16 U.S.C. § 460v (1982)).

Development of leasable minerals within the FGNRA is governed by section 5 of the Act of October 1, 1968, which provides in pertinent part:

> * * * The Secretary of the Interior * * * may permit the removal of leasable minerals from lands or interests in lands within the recreation area in accordance with the Mineral Leasing Act of February 2[5], 1920, as amended [30 U.S.C. § 181 et seq.], or the Acquired Lands Mineral Leasing Act of August 7, 1947 [30 U.S.C. § 351 et seq.], if he finds that such disposition would not have significant adverse effects on the purposes of the Colorado River storage project and the Secretary of Agriculture finds that such disposition would not have significant adverse effects on the purposes of the recreation area: Provided, That any lease or permit respecting such mineral in the recreation area shall be issued only with the consent of the Secretary of Agriculture and subject to such conditions as he may prescribe.

16 U.S.C. § 460v-4 (1982).

The record before the Board raises a threshold issue which was not briefed by the parties on appeal and which was apparently not brought to the Board's attention by the parties in the prior appeal. While the terms of the statute require that a prospecting permit for lands within the recreation area may be issued only with the consent of the Secretary of Agriculture, there is no indication from the record that the Secretary of Agriculture (or his delegate, the Forest Service) was consulted by BLM prior to issuance of the prospecting permits in this case effective December 1, 1968. In applying similar language from the Acquired Lands Mineral Leasing Act of 1947, 30 U.S.C. § 352 (1982), the Board has held that BLM is without authority to issue mineral leases where the surface management agency with responsibility for administering the land has withheld its consent. See, e.g., Beard Oil Co., 88 IBLA 268 (1985).

While we are unable to determine from the present record whether the Forest Service was, in fact, consulted prior to the issuance of the permits in December 1968, it is clear that agency does not oppose lease issuance under certain conditions. The Finding of No Significant Impact (FONSI) dated February 9, 1983, by the Regional Forester appearing in the record reaches the conclusion that "leasing and a mineral operation would be compatible with the restraints set forth in the FGNRA enabling legislation, if the conditions set forth in Alternative 1 [the leasing alternative] are met." Thus, in the decision record accompanying the FONSI it was noted that the BLM Final Sodium Mineral Development Environmental Assessment, the Forest Service's Blacks Fork Sodium Lease Environmental Analysis Report, and the Final Environmental Statement and Management Plan for the FGNRA "have been used to develop mitigation measures that the applicants must consider in preparing their final showings." The decision record further noted that if it is determined the Federal sodium

can be developed in an environmentally sound manner in compliance with the restraints in the Act establishing the FGNRA, the lands "will be leased to the holders of the preference right lease applications." Hence, it must be concluded that the Forest Service has consented to the prospecting permits and, potentially, the preference right leases, subject to the condition of compliance with the mitigating measures set forth in the decision record and proof the deposits can be profitably developed in compliance with these mitigating measures.

[1] With respect to the requirement that the lands be shown to be "chiefly valuable" for development of the sodium deposit, it must be concluded that an issue of material fact is presented. This Board has in the past recognized that where the statute imposes a "chiefly valuable" requirement, as under the building stone placer law at 30 U.S.C. § 161 (1982), more than a discovery of a valuable deposit is required and a comparison of the value of the land for development of the mineral as opposed to the value for other purposes is mandated. United States v. Kosanke Sand Corp. (On Reconsideration), 12 IBLA 282, 299-302, 80 I.D. 538, 547-48 (1973). Now the comparative value standard has been embodied in a regulation:

> "Chiefly valuable" means a valuable deposit where there is no significant conflict between the extraction of sodium, sulphur or potassium and any non-mineral disposition of the lands. Where such extraction conflicts with other disposition, the lands shall be deemed chiefly valuable for sodium, sulphur or potassium extraction if the economic value of the lands for extraction of such minerals exceeds its economic value for any non-mineral disposition.

43 CFR 3500.0-5(k), 49 FR 17900 (Apr. 25, 1984). Contrary to the contention of BLM on appeal, we find this to be a question of fact rather than policy.

With regard to the question of whether a valuable deposit has been shown, we note the term has been defined by regulation as follows:

> "Valuable deposit" means a mineral occurrence where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his/her labor and means, with a reasonable propect of success, in developing a valuable mine.

43 CFR 3500.0-5(j). It is well established that a sodium prospecting permit holder who applies for a preference right lease alleging with supporting data that he has discovered a valuable deposit of sodium and that the land is chiefly valuable for sodium as required by section 24 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 262 (1982), is entitled to an evidentiary hearing before an Administrative Law Judge before his application may be rejected. Marine Minerals Corp., 25 IBLA 153 (1976); Wolf Joint Venture, 75 I.D. 137 (1968); see 43 CFR 3521.1-1(g)(2). Although more information has been amassed since the Board's last decision in this case, the issue remains one which can only be resolved at a hearing.

[2] An additional requirement for mineral leasing within the FGNRA is that the Secretary of the Interior (or his delegate) find that "such disposition would not have significant adverse effects on the purposes of the Colorado River storage project." 16 U.S.C. § 460v-4 (1982). A stipulation attached to the prospecting permits noted certain lands embraced therein are within the Flaming Gorge Reservoir and provided:

> [T]o insure against the contamination of the waters of the Flaming Gorge Reservoir, Colorado River Storage Project, the permittee agrees that the following further conditions shall apply to all mining and mining operations on the above-described lands: Mining locations and operations shall be approved by the Regional Director, Bureau of Reclamation, or his authorized representative, before mining or associated operations
> begin * * *.

Appellants' proposal to mine under the reservoir 4/ and the resulting opposition of the Bureau of Reclamation is one of the grounds cited by BLM in support of its decision rejecting appellants' preference right lease applications. 5/ Appellants' final showing discussed the potential impact of subsidence caused by underground mining. Under the heading "Other Mitigating Measures," the final showing stated in part:

> More than 30 years mining experience in the trona basin has determined rock characteristics and other factors controlling subsidence with sufficiently reasonable accuracy to allow prediction of the surface effects of all controlled mining in the competitive bid area. Even though there are local variations, predictions can be made with sufficient accuracy to establish mining patterns and pillar support systems that will completely eliminate the possibility of surface subsidence.
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> Experience in the trona basin has demonstrated that the surface reflection of the cave mined out beds below takes the

4/ Mining underneath the waters of the Flaming Gorge Reservoir and the area 1,000 feet horizontally outside contour elevation 6,045 feet (approximate high level of the reservoir) is prohibited by stipulation attached to the prospecting permits. However, economic development of the trona deposit is tied to concurrent development of the trona under adjoining interspersed private lands, some of which lie under the reservoir. Development of these lands is not restricted by the stipulation and mining under the reservoir on these lands is contemplated according to the final showing.

5/ Although the consent of the Bureau of Reclamation is a separate prerequisite of leasing within the FGNRA, the BLM decision cited the objection of the Bureau of Reclamation in support of its conclusion the land was not chiefly valuable for sodium leasing (Decision at 3).

> form of a gradual downward bending of the surface - eventually creating a depression or low area. The final amount of the surface deflection would be in the order of 3/4 of the height of the original underground opening. However, it must be emphasized that this would be the result of a planned removal of the original support pillars with the intention of increasing the recoveries to a much higher percentage than the original 40% to 65% that would be removed during first mining operations.
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> The possibility that reservoir waters could flood underground mine tunnels at a depth of * * * 1000 feet below the surface is completely unrealistic. In most areas of the trona basin there are water flows in the upper Wilkins Peak Formation (trona bearing section) and in the lower Laney Sandstone Formation immediately overlying the Wilkens Peak. These flows produce surface pressures ranging from 10 to 100 p.s.i. with bottom-hole flow pressures from 460 to 560 p.s.i. at a depth of 1000'. The formation rock pressure due to overburden would be about 500 p.s.i. The possibility that reservoir waters fifty feet deep and exerting a weight on the lake's bottom of 22 p.s.i. could force [its] way downward through the formation pressures is of course impossible. The only way that such an event could take place would be to have the earth open up creating a very wide open chasm.

The response of the Bureau of Reclamation is set forth in an October 9, 1984, memorandum from the Regional Director to the BLM State Director. In responding to the portion of appellants' final showing dealing with the issue of whether subsidence will result from mining under the reservoir, the Regional Director states:

> The answer to question 1 6/ was "yes." Mining of sodium beneath the reservoir will cause subsid[e]nce. Subsid[e]nce is, of course, controllable for the short term, but does eventually occur with impacts varying from little or none to considerable. Impact being measured by many different scales depending on whose side you are on.
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> What they have given us is, of course, only their opinion. They have provided us with little, if any, real data to substantiate what they have said, i.e. where are the data on rock mechanics, rock strengths, permeabilities, ground water, water quality, etc?

6/ The text of question 1, as stated in the final showing, is: "Would the mining of sodium beneath the Flaming Gorge Reservoir cause subsidence?" (Final showing at 17).

The issue, as phrased in the Director's memorandum, is whether "mining and subsequent subsid[e]nce of a portion of the reservoir basin [will] cause * * * an increase in the salinity of the Colorado River System." In stating that resolution of this question must come "prior to the leasing of these lands for mining," the Director clearly rejects appellants' contention regarding subsidence and requires further evidence as a condition of his consent. The decision of the Departmental official delegated with authority to decide whether a mine plan entails undue environmental hazard will not be disturbed on appeal where the record establishes a rational basis for the decision merely because an appellant disagrees with the conclusion. See Glacier-Two Medicine Alliance, 88 IBLA 133 (1985); Southwest Resource Council, Inc., 73 IBLA 39 (1983). However, where the record in support of the decision is conclusory in nature, the case may be remanded to allow the record to be supplemented to support the decision. See Esdras K. Hartley, 54 IBLA 38, 88 I.D. 437 (1981). Where there is a dispute regarding material facts necessary to resolution of a case on appeal, the Board has the discretionary authority under 43 CFR 4.415 to order an evidentiary hearing before an Administrative Law Judge. See Patricia C. Alker, 70 IBLA 211 (1983); Cf. KernCo Drilling Co., 71 IBLA 53 (1983) (Hearing before an Administrative Law Judge required only where there is a material issue of fact requiring resolution through testimony). In light of the issue regarding the threat of salinity from subsidence, we find that a hearing on this issue is also required.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the case is referred to the Hearings Division for assignment of an Administrative Law Judge whose decision shall be final for the Department in the absence of a timely appeal by an adversely affected party.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge

ADMINISTRATIVE JUDGE HARRIS CONCURRING:

Appellants seek two preference right sodium leases including lands within the Flaming Gorge National Recreation Area (FGNRA). The Secretary of the Interior may permit the removal of leasable minerals within FGNRA "if he finds that such disposition would not have significant adverse effects on the purposes of the Colorado River storage project and the Secretary of Agriculture finds that such disposition would not have significant adverse effects on the purposes of the recreation area." 43 U.S.C. § 460v-4 (1982). Further, any permit or lease for such mineral may only be issued with the consent of the Secretary of Agriculture. 43 U.S.C. § 460v-4 (1982). Also in this case since appellants are seeking preference right leases, they must show the discovery of a valuable mineral deposit and that the lands are chiefly valuable for sodium. 43 CFR 3521.1-1(d).

Appellants have submitted information previously required by the regulations and designated as the initial and final showings. This information was referred to both the Bureau of Reclamation (BuRec) and the Forest Service for analysis and comment. In its decision BLM stated that it consulted with BuRec and the Forest Service and "[b]oth agencies strongly oppose issuance of a preference right lease" (Decision at 2). I cannot find that the record supports this characterization by BLM.

The record does not show that either agency strongly opposes leasing. Both registered reservations about leasing. Each cited further information or requirements that would be necessary to assure them that leasing could take place. 1/ BLM referenced some of those concerns in its February 14, 1985, decision. In their statement of reasons appellants made no attempt to address them. Nor did appellants respond to BLM's conclusion, based upon the BuRec and Forest Service comments, that the lands are not chiefly valuable for sodium, but are chiefly valuable for reservoir purposes and for recreation.

BLM further found that appellants failed to show the discovery of a valuable mineral deposit. This rationale for rejection appears to be well founded. Each application encompasses more than 2,000 acres, yet during the life of the prospecting permit only one core hole was drilled in each area. BLM also noted that appellants had significantly underestimated the costs of mining, based on BLM's cost comparisons with existing trona operations in the Green River area. Moreover, BLM cites appellants' hypothetical mining plan as being severely deficient with respect to safety considerations, and that correction would make the proposed operation uneconomic.

1/ Following review of appellants' final showing, the Acting Regional Director, BuRec, in an Oct. 9, 1984, memorandum to the BLM Wyoming State Director, stated:

"Should they not be able to provide these data or be unwilling to do so, we would suggest that no consideration be given for leasing of these lands. The value of the Flaming Gorge Reservoir and the Colorado River is

In their statement of reasons, appellants do not try to refute BLM's findings regarding the discovery of a valuable deposit, rather they cite to earlier Geological Survey memoranda recommending lease issuance. 2/ Appellants also request issuance of the leases so they may be "exchanged for lands of equal sodium value outside of the sensitive Flaming Gorge Recreation Area" (Statement of Reasons at 2).

Clearly appellants are frustrated with delays concerning their applications for leases; however, such leases may not be issued without the necessary showings. The fact that Geological Survey memoranda at certain times recommended lease issuance is not dispositive. In order to be entitled to lease issuance, appellants must show the discovery of a valuable mineral deposit and that the lands are chiefly valuable for sodium. BLM found that appellants had failed to establish either. Based upon the present record, I agree. However, the regulations provide that where facts have been alleged which show entitlement to a lease, "a permittee shall have a right to a hearing before an Administrative Law Judge in the Office of Hearings and Appeals."

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fn. 1 (continued)
much too high to be subjected to such unnecessary risks as this, without definite assurance that mining, over the long term, will in no way affect water quality."
A Sept. 25, 1984, letter from the Forest Supervisor, Ashley National Forest, to the BLM District Manager, Rock Springs District, after raising several questions about the proposed operation, concluded:

"We are not opposed to the underground mining of valuable mineral deposits within the NRA, as long as the values identified in [16 U.S.C. § 460v-4 (1982)] can be preserved. However, under this proposal, the applicants' processing plant and support facilities could have significant environmental impacts upon the visual, air quality, and recreation values of the Flaming Gorge National Recreation Area." It is clear that relocation of appellants' processing plant would be necessary to address the concerns of the Forest Service.

2/ Attached to appellants' statement of reasons is a copy of a 1971 memorandum from the Chief, Conservation Division, on behalf of the Director, Geological Survey, to the Manager, BLM Land Office, Cheyenne, Wyoming, recommending that "a lease be issued for all of the available lands under the captioned permits." Also accompanying the statement of reasons is a copy of an Aug. 21, 1981, memorandum from the Conservation Manager, North Central Region, Geological Survey, to the Regional Solicitor's office. The memorandum recommends issuances of the preference right lease to appellants, acceptance of the initial showing, and states that "[t]he recommendations supersede and reverse the Geological Survey's March 29, 1979, recommendation to reject the applications." The 1981 recommendation was apparently based on Geological Survey's conclusion that there was compliance with all the provisions of the regulations in effect at the time the applications were filed in 1970. Appellants' reliance on that conclusion ignores the fact that by statute the applicant for a lease must show "to the satisfaction of the Secretary of the Interior" that valuable deposits of sodium have been discovered and that the land is chiefly valuable for sodium. 30 U.S.C. § 262 (1982).

43 CFR 3521.1-1(g)(2). At such a hearing, the permittee has the burden of going forward with the evidence and the ultimate burden of persuasion by a preponderance of evidence that a valuable deposit of minerals was discovered and that the lands are chiefly valuable for such minerals. 43 CFR 3521.1-1(g)(3).

Therefore, even though appellants have not requested a hearing, this case must be referred to the Hearings Division in order to accord appellants their right under the regulations to a hearing. Should appellants not avail themselves of that opportunity and no further evidence is tendered, the applications should be rejected.

Bruce R. Harris
Administrative Judge